Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States
October Term, 1997

CHARLES R. STRASBURGER,
Petitioner,

v.

BOARD OF EDUCATION, HARDIN COUNTY COMMUNITY UNIT SCHOOL DISTRICT NO. 1; HARDIN COUNTY EDUCATION ASSOCIATION OF THE ILLINOIS EDUCATION ASSOCIATION/ NATIONAL EDUCATION ASSOCIATION; DAN AUSTIN; DENNIS AUSTIN; DAN BRIDGES; and GERALD MILLER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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43 pp

Question Presented for Review

A tenured school teacher was fired from his job by a school board which used a sham reduction-in-force procedure in order to circumvent his constitutionally-protected property rights. He attempted to bring in federal district court a 42 USC § 1983 due process action based upon the state taking his property rights in his tenured employment.

The lower federal courts granted summary judgment against the teacher, reasoning that this Court's *Parratt v. Taylor*, 451 U.S. 527 (1981), decision prohibited plaintiff from pursuing a § 1983 action in federal court, because the lower courts felt that this teacher had the option of pursuing an action in state court under state laws. The plaintiff strongly preferred to pursue in federal court a § 1983 action attacking directly the state government's constitutional abuses.

The question presented for review is this:

When a state governmental body, authorized with decision-making powers in the relevant area, is alleged to have violated deliberately a citizen's clearly-established property rights, then does this Court's ruling in *Zinermon v. Burch*, 494 US 113 (1990), entitle that citizen to pursue a Section 1983 civil rights action in the federal courts, instead of being relegated exclusively to the state court forum because of *Parratt v. Taylor*?

List of Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed

The caption contains the name of all of the parties. No parent companies or nonwholly-owned subsidiaries are involved.

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Citations to Opinions Below

The Petitioner is seeking a writ of certiorari to the United States Court of Appeals for the Seventh Circuit regarding their opinion issued May 4, 1998, in cause no. 97-1302 in that court. The official citation for that opinion is *Strasburger v. Board of Education*, 143 F3d 351 (7th Cir. 1998). That opinion is reprinted in the Appendix.

Jurisdictional Statement

On May 4, 1998, the United States Court of Appeals for the Seventh Circuit issued an opinion affirming the district court's decision granting summary judgment against the Petitioner Strasburger. A petition for rehearing was filed May 18, 1998, seeking a rehearing before the original panel, or, in the alternative, a rehearing en banc. The Appellate Court first ordered the appellees to file an answer to the petition. After that answer was filed, however, the Seventh Circuit issued an order, dated June 26, 1998, stating that all of the judges on the original panel had voted to deny a rehearing, and the alternative relief seeking a rehearing en banc also was denied. Accordingly, the petition for rehearing was denied June 26, 1998.

This petition for a writ of certiorari has been filed pursuant to Supreme Court Rule 13 within 90 days of the denial of rehearing by the original panel.

The jurisdiction of the Court is invoked pursuant to 28 USC § 1254(1).

The Seventh Circuit Court of Appeals has decided an important question of federal law—the jurisdiction of the federal district courts as applied in Section 1983 civil rights actions—in a way which conflicts with controlling and relevant decisions of this Court, and thus a compelling reason exists for granting this writ of certiorari, as set forth in Supreme Court Rule 10(c).

Constitutional Provisions and Statutes Involved

42 USC § 1983:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourteenth Amendment of the U.S. Constitution:

> No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Charles Strasburger was hired as a teacher and high school basketball coach by Hardin County Board of Education, Elizabethtown, Illinois. His 10-year coaching resume in Illinois included a state championship, a state coach of the year award, and a career winning percentage in Illinois of over 70%. During his third year at Hardin County he ran afoul of some of the school board members. Several members vowed to get rid of him, but were stymied by the fact that Strasburger had earned tenured status, which meant that he could not be fired except for just cause.

The board falsely accused him of skimming money off of basketball shoe sales. He was suspended, and after a five-week independent investigation, cleared of the charges. However, at the time of this suspension, certain board members dredged up and made public a 17-year-old criminal trespass conviction against Strasburger, which had occurred while Strasburger was living in Kentucky.

The previous school board had known of these charges at the time Strasburger was granted tenure. Nevertheless, the present board president told a member of the community: "We need to get rid of that S.O.B. Strasburger before he hurts one of those girls", referring to school girls.

After the independent investigation cleared Strasburger regarding the basketball shoe sales, members of the majority of the school board made statements that they still were going to get Strasburger, one way or the other, using any necessary measure.

Shortly after reinstatement, the Board informed Strasburger that his teaching position had been RIF'ed, and that he was being terminated as a teacher and coach. In Illinois, one of the few available methods by which a tenured teacher can be terminated lawfully is by the use of a "reduction in force" ("RIF") procedure, in which a teaching position is eliminated because of economic concerns within the district. Illinois statutes provided that certain public hearings needed to be held if a certain minimum number of teachers were RIF'ed in a district in any one year. (105 ILCS 5/24-12) Those minimums were not reached, so no public hearings were required.

The Board never conducted any investigations into the economic need to eliminate Strasburger's position. One board member testified in deposition that classroom assignments were juggled by the board in order that

Strasburger could not use his seniority to bump untenured teachers.

No other teacher had been RIF'ed during the past 13 years in Hardin County.

Strasburger filed a claim in the United States District Court for the Southern District of Illinois against the school board, pursuant to 42 USC § 1983, alleging that he was deprived of his substantive due process interest in property, namely his tenured employment, without due process of law, and also alleged that he was denied his liberty interest in his right to be free from an unfairly stigmatized professional reputation.

The district court granted the Board's motion for summary judgment. Strasburger appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit, by a 2-1 decision, affirmed the grant of summary judgment. Strasburger filed a petition for rehearing, which eventually was denied.

The jurisdiction of the federal district court, for the claim against the school board and board members, was based upon the existence of a 28 USC § 1331 federal question, under 42 USC § 1983 and the Fourteenth Amendment to the United States Constitution. The statutory provision which conferred jurisdiction to the Seventh Circuit was 28 USC § 1291, involving an appeal from a final decision of the district court.

Reasons for Allowing this Writ

The federal district courts, spooked by the prospect of having to tackle too many frivolous Section 1983 cases, are over-reacting to the point where they are refusing to hear even the most basic civil rights cases.

Construing the purpose for which the Congress passed Section 1983, this Court wrote:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right *in federal courts* because, by reason of prejudice, passion, neglect, intolerance or otherwise, state law might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."

Parratt v. Taylor, 451 US 527, 534-35, quoting *Monroe v. Pape*, 365 US 167, 180 (1961). [Emphasis added by italics.]

This Court previously had limited somewhat the application of Section 1983 in the federal courts through its decision of *Parratt v. Taylor*, 451 US 527 (1981), which recognized a boundary to Section 1983 procedural due process claims in situations when the states have provided an effective remedy. The general intent of this restriction was to avoid negligence-type claims or claims involving lower-

level employees or claims in which a due-process hearing would serve no function. However, the lower federal courts, as exemplified by the present case, are expanding *Parratt* into a broad and impenetrable shield by which the district courts are fending off even the most basic Section 1983 cases. Furthermore, the parameters defining the type of Section 1983 case which a federal district court will accept are becoming indecipherable.

That trend of abstentionism needs to be stemmed by this Court. Clearer parameters need to be defined for when federal courts should allow, or should refuse, 1983 actions.

This broadening of *Parratt*, as applied by the Seventh Circuit in this present case, has resulted in the lower federal courts ruling that a Section 1983 action cannot be pursued in federal courts, even when the state agency—the district school board—having the direct and state-delegated power to hire and fire teachers is accused of conspiring to terminate a teacher by an fraudulent reduction-in-force procedure.

This was not some random, unauthorized occurrence, which could not be foreseen and therefore could not be addressed by a pre-deprivation hearing. This was an intentional, premeditated, deliberate and lethal taking of a citizen's property by the very governmental agency authorized and empowered to control the giving and taking of these types of property rights. This type of taking

also was predictable, in that a RIF is a foreseeable method which could be used to circumvent tenure rights.

Strasburger also claimed that the board's conduct also damaged his due process liberty interest in his employment. The majority granted summary judgment on that claim for the reason that the majority construed the board president's public statement ("We need to get rid of that SOB Strasburger before he hurts one of those girls"), even under a summary judgment standard, as mere opinion and not a false assertion of fact. (*Strasburger* decision at 6) The majority failed to consider the overall conduct of the board—such as the suspension and dredging up of past criminal records—in determining whether Strasburger was stigmatized in his employability, and considered only board members' verbal statements.

The Seventh's Circuit majority opinion in this case is muddled, as are many of the appellate circuit opinions in this churning area of the law. Judge Kanne, for the majority, felt "In the absence of elucidation from the Supreme Court', that in order to pursue a Section 1983 property cause of action the plaintiff must show "that the decision was arbitrary and irrational", and that "the state remedies are inadequate". (*Strasburger* decision at page 8) Judge Kanne then noted that the "contours of the *Parratt* jurisprudence are ill-defined". (*Strasburger* decision at 10)

Circuit Judge Flaum, in his dissent, argued that the majority misapplied the principles of *Zinermon v. Burch*,

494 US 113 (1990). The dissent concluded that the board's actions were both predictable and authorized, and this case should have fallen under the precedent of *Zinermon*. Judge Flaum further concluded that the evidence submitted by Strasburger created a genuine issue of fact with respect to whether the RIF procedure was a sham.

The *Zinermon* Court felt that in order to understand the parameters of *Parratt*, jurists must first harken back to *Monroe v. Pape*, 365 US 167 (1961).

> In Monroe, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law. It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." 365 us, at 173-174, 5 L Ed 2d 492, 81 S Ct. 473. The Court said:
>
> > "It is no answer that the State has a law which if enforced

> would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id., at 183, 5 L Ed 2d 492, 81 S Ct 473.
>
> Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. . . . As was noted in Monroe, in many case there is "no quarrel with the state laws on the books," id., at 176, 5 l Ed 2d 492, 81 S Ct 473, instead, the problem is the way those laws are or are not implemented by state officials.

Zinermon, 494 US at 124. *Zinermon* further held, on this issue of whether the presence of state causes of action should preempt a Section 1983 action in the federal district court:

> First, the [Fourteenth Amendment Due Process] Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under § 1983 for state officials, violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a *substantive*

> *component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them."* Daniels v. Williams, 474 US, at 331, 88 L Ed 2d 662, 106 S Ct 662. As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. Id., at 338, 33 L Ed 2d 662, 106 S Ct 662 (Stevens, J., concurring in judgments). *A plaintiff, under Monroe v. Pape, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.*

Zinermon, 494 US at 125-26 (Emphasis added by italics).

The reasoning of the *Zinermon* Court still is the controlling law, and is directly applicable to the resolution of this appeal.

The appellate courts and commentators, however, struggle with the application of *Zinermon* and *Parratt*, and have since their issuance. Judge Easterbrook, who joined in the majority opinion in the present case, has lamented that the *Zinermon* justices take a meandering line in setting forth the reasoning of the decision, and that this "hair-splitting" results in precedent in the area "resembling the path of a drunken sailor". *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990). The Columbia Law Review has said that, in this area of the law, "constitutional precedent is

sparse, the constitutional text provides little guidance, and the history of substantive due process adjudications abounds with embarrassments". Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, COLUMBIA LAW REVIEW, Vol. 93, No. 2, March 1993, p 309, 326. Fallon writes, in that same piece: "All that seems certain is that the Supreme Court will have to provide clarification." p. 347, fn 219.

What Strasburger prays that this Court would do is establish, or re-establish, clear precedent that when a decision-making body of the state government engages in premeditated conduct to deprive a citizen of clearly-recognized rights, then that conduct is neither "random" nor "unauthorized", and the *Parratt* analysis should be not be allowed to deprive United States citizens from calling state governmental agencies to task in a federal forum for their civil rights violations. A federal district court's analysis should not stop at whether a state cause of action potentially could be crafted.

In analyzing the method of employing the *Parratt* defense to procedural due process claims, the majority noted:

> Due process, as this Court often has said, is a flexible concept that varies with the particular situation. To determine what procedural protections the constitution requires in a particular case, we weigh several factors:

> "First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v Eldridge, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976).

Applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property. See, e.g., Cleveland Board of Education v. Loudermill, 470 US 532, 542, 84 L Ed 2d 494, 105 S Ct 1487 (1985) ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a

> hearing *before* he is deprived of any significant protected interest'"....

Zinermon, 494 US at 127 (emphasis in original). This Court held in *Zinermon* that the *Parratt* exception in reality was a special class of cases established through the general analysis described (and set forth in the preceding quotation) in *Mathews v. Eldridge*, 424 US 319 (1976).

This present case does not involve a situation like in *Parratt*, when a low-level state employee, not in the position or possessing the authority to make policy or conduct a hearing, mishandles an art kit. *Zinermon*, 494 US at 138. In Strasburger, the very body charged by state law to hire and fire teachers embarked upon a plan to skewer his property rights, by conduct the actors knew to be wrong.

Concerning the liberty interest claim, Strasburger prays that this Court accept this case to review because the appellant court and the district court misapplied this Court's precedent. The lower courts in *Strasburger* determined that a person's liberty interest in not being stigmatized in their employment should be narrowed to only an examination of stigmatizing oral statements, and that statements which were not necessarily true could not be stigmatizing.

This Court has established that when the government terminates a public employee, and makes false or sub-

stantially inaccurate public charges or statements which stigmatize the employee, then that employee's liberty interest is implicated. *Codd v. Velger*, 429 US 624, 630 (1977); *Board of Regents v. Roth*, 408 US 564, 573 (1972). The resurrecting of more than decade-old criminal trespass records and sexual assault charges was not relevant to the board; its members testified that they knew of this background when tenure was granted. The board majority admitted it never considered suspending Strasburger because they thought of him as being a danger to the students. The board's use of this information and of the suspension was to destroy Strasburger's reputation so that less public opposition would surface in reaction to his ultimate firing.

The Seventh Circuit has held that to state such a claim, a plaintiff must show that "(1) he was stigmatized by the defendant's *conduct*; (2) the stigmatizing information was publicly disclosed; and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure." *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991); see *Codd v. Velger*, 429 U.S. at 628; *McMath v. City of Gary, Ind.*, 976 F.2d 1026, 1031-1032 (7th Cir. 1992). [Emphasis added by italics.]

This Court should make clear that the standard to be applied should include scrutiny of the defendant's entire potentially stigmatizing conduct, and not just the defendant's stigmatizing speech.

Furthermore, the lower courts' conclusion, in the context of determining whether summary judgment should be granted, that no reasonable juror as a matter of law could consider being called a rapist as stigmatizing because the employee has not in fact raped someone, places the law in an absurd light.

The liberty interest ruling also should be reversed.

Conclusion

When a decision-making body of state government deliberately embarks to take recognized property rights from a citizen, then that citizen should be allowed to bring a Section 1983 civil rights claim in the federal courts, despite the potential presence of related state remedies; *Parratt* should not control and defeat this federal cause of action.

Strasburger's Petition for writ of certiorari should be granted.

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Certificate of Service

The undersigned upon his oath swears that on the 23rd day of September, 1998, he served three copies of the foregoing Petition for Writ of Certiorari upon the following persons (attorneys of record for the Respondents who were the Appellees in the Court of Appeals) by placing this document in the United States Post Office in Marion, Illinois, with first-class postage prepaid, sent to the addresses set forth below:

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In the
United States Court of Appeals
For the Seventh Circuit

No. 97-1302

CHARLES R. STRASBURGER,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION, HARDIN COUNTY COMMUNITY UNIT SCHOOL DISTRICT NO. 1, HARDIN COUNTY EDUCATION ASSOCIATION OF THE ILLINOIS EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION, DAN AUSTIN, DENNIS AUSTIN, DAN BRIDGES, and GERALD MILLER,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 94-CV-4272-JPG—**J. Phil Gilbert**, *Chief Judge*.

ARGUED OCTOBER 31, 1997—DECIDED MAY 4, 1998

Before FLAUM, EASTERBROOK, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. The Hardin County Board of Education ("School Board") terminated a teacher, Charles R. Strasburger ("Strasburger"), using a reduction-in-force procedure. Strasburger insists the reduction-in-force was pretextual and the School Board engaged in a conspiracy to dismiss him for illegitimate reasons. He sued under 42

U.S.C. § 1983, claiming violations of his substantive due process liberty and property interest in employment, a violation of procedural due process, intentional infliction of emotional distress, and breach by the Hardin County Education Association ("Union") of the duty of fair representation. The district court dismissed the claim against the Union and granted summary judgment for the remaining defendants on all other claims. We affirm.

I. HISTORY

We recount the facts in the light most favorable to Strasburger. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The School Board hired Strasburger in 1991 as Hardin County's industrial arts teacher, athletic director, and basketball coach. Strasburger had an impressive record as a high school basketball coach. By 1991 he had coached a team to the Illinois boys' basketball championship and two other teams to the finals. He was Illinois Basketball Coach of the Year in 1988 and district coach of the year five times. His overall winning percentage was 71%. Everything seemed to be going smoothly at Hardin County until Strasburger's second year, when he disciplined one of his basketball players, angering the boy's father, Gerald Miller ("Miller"). Shortly thereafter, Miller ran for a School Board position and won. Also on the School Board were individual defendants Dan Austin, Dennis Austin, and Dan Bridges. Some of the School Board members voiced their opinion that Strasburger should be dismissed.

Around the same time, the School Board became aware that Strasburger had a criminal record. He had been charged in Kentucky some fifteen years prior with burglary, sexual abuse, criminal trespass, and disorderly conduct; he was convicted only of criminal trespass and disorderly conduct and served one year in jail. After that he was not convicted of any other crimes. Accurate copies of Strasburger's criminal record began to circulate in the

community. A letter derogatory to Strasburger appeared on car windshields. Rumors began to fly that Strasburger was a rapist and a danger to girls. Parents expressed their concern about Strasburger teaching their children.

On November 9, 1993, the new School Board held its first meeting. Their first official action, done in executive session, was to suspend Strasburger with pay from his coaching and athletic director duties but to allow him to continue teaching. Strasburger received no notice or opportunity to be heard regarding his suspension. The School Board's stated reason for suspending Strasburger was to investigate allegations that Strasburger was accepting illegal kickbacks from a tennis shoe company that supplied shoes to the county's athletic teams and allegations that he had entered into a contract without authorization from the School Board. The School Board also wanted to look into Strasburger's criminal past to discover whether he had any additional criminal history. During the suspension Strasburger was ordered to leave the school grounds every day at 1 p.m. and to turn in his keys. At the conclusion of the investigation, however, on December 20, 1993, the School Board reinstated Strasburger to his coaching and athletic director duties.

On March 10, 1994, the School Board conducted a reduction-in-force in accordance with Illinois procedures. Strasburger was honorably dismissed for the stated reasons that the School Board needed to conserve funds and the enrollments for his industrial arts classes were too low to justify the position. From 1981 to 1994 only one other teacher was dismissed after a reduction-in-force, and she was subsequently rehired.

Strasburger finished the year at Hardin County. In the 1994-1995 year he taught at the Carmi High School some distance from his home for lesser pay. In 1995-1996 he taught at the Shawnee Correctional Center, which is closer to his home and pays about the same as he was making in Hardin County (although the job is year-round rather than

only nine months). Neither job involved athletics. He applied for six high school coaching jobs in Southern Illinois but he was not called for any interviews. He filed this suit in 1994.

II. ANALYSIS

A. Standard of Review

We review a district court's decision to grant summary judgment *de novo*, drawing our own conclusions of law and fact from the record before us. *See Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Anderson*, 477 U.S. at 255. However, neither "the mere existence of *some* alleged factual dispute between the parties," *id.* at 247, nor the existence of "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), is sufficient to defeat a motion for summary judgment.[1]

B. Liberty Cause of Action

To make out a violation of § 1983, a plaintiff must show that "the conduct complained of was committed by a per-

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[1] The School Board members appear to have an absolute immunity defense for their legislative actions under *Bogan v. Scott-Harris*, 118 S. Ct. 966 (1998). However, the defendants never raised such a defense. It is waived, and we do not address it.

son acting under color of state law" and "this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Although the Constitution guarantees neither liberty of occupation, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972), nor liberty of reputation, *Paul v. Davis*, 424 U.S. 693, 708 (1976), the Supreme Court suggested in *Roth* that the state infringes on an employee's liberty interests if it discharges an employee while making false charges against him, so damaging the employee that he is precluded as a practical matter from finding other government employment. Since then, we have held many times that state employees have a liberty interest in not being discharged from their employment while being defamed such that they cannot get other government employment. *See, e.g.*, *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997), *cert. denied*, No. 97-927, ___ U.S. ___, ___ S. Ct. ___, 1998 WL 69590 (Feb. 23, 1998); *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1349 (7th Cir. 1995); *Wallace v. Tilley*, 41 F.3d 296, 299 (7th Cir. 1994); *McMath v. City of Gary*, 976 F.2d 1026, 1031-32 (7th Cir. 1992); *Johnson v. Martin*, 943 F.2d 15, 16 (7th Cir. 1991); *Ratliff v. City of Milwaukee*, 795 F.2d 612, 625 (7th Cir. 1986). To prevail on this liberty cause of action, a discharged state employee must show that "(1) he was stigmatized by the defendant's conduct, (2) the stigmatizing information was publicly disclosed, and (3) he suffered a tangible loss of other employment opportunities as a result of public disclosure." *Johnson*, 943 F.2d at 16. Strasburger has not shown a genuine issue of material fact as to the first element. We will not address the second and third elements because the first is dispositive. Since Strasburger cannot make out a constitutional violation, he has no cause of action under § 1983.

The first element requires the employee to show that a public official made defamatory statements about him. These statements must be false assertions of fact. *See, e.g.*, *Ratliff*, 795 F.2d at 625. True but stigmatizing statements

that preclude further government employment do not support this type of claim. Nor do statements of opinion, even stigmatizing ones, if they do not imply false facts. We also require the statements to come from the mouth of a public official. *See McMath*, 976 F.2d at 1031. Rumors and statements made *to* public officials do not suffice. Since the remedy available to a discharged employee who proves all the elements of the cause of action is a name-clearing hearing, *Codd v. Velger*, 429 U.S. 624, 627 (1977), the statements must be of a kind such that the discharged employee could refute them and clear his name, given the opportunity.

Strasburger puts forth evidence of several statements that, no doubt, stigmatized him. First, he points to a statement made by School Board member Dennis Austin to non-official Jim Shelby. Shelby submitted via affidavit that Austin said to him, "We need to get rid of that SOB Strasburger before he hurts one of those girls." Aff. of Jim Shelby, *Strasburger v. Board of Educ.*, No. 94-CV-4272-JPG (S.D. Ill. Oct. 9, 1996). This statement is not a false assertion of fact—it is Austin's expression of opinion. This cause of action curtails no expression of opinion that does not imply a falsehood.

Second, Strasburger's wife asserted in her deposition that Dan Austin told a non-official at a School Board meeting, "Well, he has a lot of criminal charges and we've got to check them all out," and that he said something about a rape. Dep. of Kathy Strasburger at 54, *Strasburger v. Board of Educ.*, No. 94-CV-4272-JPG (S.D. Ill. July 29, 1996). Kathy Strasburger did not personally hear Austin make these statements. The listener later recounted the statements to her. The statement about criminal charges was not false—Strasburger indeed has a criminal record. Austin then expressed his intent that the School Board investigate. Again, this is not a false statement. It is an intention. And finally, Kathy Strasburger's assertion that Austin said something about a rape is not precise enough to be false. We cannot discern from the record whether

Austin was making a prediction about the future or whether he was referring to the charge of sexual assault in Strasburger's criminal record. Evidence that Austin called Strasburger a rapist or asserted that he had raped someone would indeed be the kind of false and stigmatizing statement that might defeat summary judgment, but the evidence we see here is too vague to establish a genuine issue of material fact.

Third, School Board member Lafferty recounted in his deposition that he saw a letter authored by School Board member Gerald Miller. Lafferty testified that he did not read the letter closely and cannot quote from it or remember words from it, but he recalls it was generally "derogatory" toward Strasburger. The letter apparently was distributed on car windshields in a parking lot. While the letter was doubtless stigmatizing, again we find ourselves unable to determine whether the letter contained false statements. "Derogatory" statements could well be true, but this cause of action requires false statements.

Fourth, Lafferty also testified in his deposition about a particular exchange at a School Board meeting. In response to the question, "Can you give me a flavor of what was said, what the discussion was about?" Lafferty replied, "The terms pervert were used [sic]. There was a telephone conversation between Dan Austin and myself in which Mr. Strasburger was discussed and his fitness to remain as a teacher and the danger to the children." Dep. of Edward Lafferty at 26, *Strasburger v. Board of Educ.*, No. 94-CV-4272-JPG (S.D. Ill. July 18, 1996). Even assuming that the word "pervert" was used at a public School Board meeting and not on the telephone to a fellow School Board member, we find no statement of fact. Austin again expressed his opinion about Strasburger without making a false assertion of fact.

Finally, Strasburger points to numerous places in the record where deponents assert they heard "rumors" to the effect that Strasburger is a rapist. No one was able to testify that they heard these rumors from a public official, as

we require. The record leaves no doubt that Hardin County has not treated Strasburger well, but the record does not reflect a constitutional violation. Because Strasburger cannot provide evidence of false statements made by public officials, he cannot satisfy the elements of the employment/defamation cause of action. Since he cannot demonstrate a constitutional violation, his § 1983 claim on this count must fail. The district court properly granted summary judgment.

C. Property Cause of Action

Strasburger bases his second cause of action on a substantive due process property interest. He asserts that the School Board's conspiracy to take away his tenured employment deprived him of a constitutionally protected property interest. The district court granted summary judgment for the defendants because, under the doctrine of *Parratt v. Taylor*, Strasburger had adequate state remedies available to him and thus had not suffered a loss of due process. 451 U.S. 527 (1981). We do not even reach the *Parratt* question because Strasburger has not properly raised a substantive due process property interest claim.

To make out a violation of § 1983, a plaintiff must show that "the conduct complained of was committed by a person acting under color of state law" and "this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt*, 451 U.S. at 535. In the absence of elucidation from the Supreme Court, it has long been our precedent that a plaintiff who challenges the substance of a government decision on substantive due process grounds (as opposed to challenging the process the decision-makers used on procedural due process grounds) must show (1) that the decision was arbitrary and irrational, and (2) that the decision-makers either committed another substantive constitutional violation or that state remedies are inadequate. *See Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 958 (7th Cir. 1988); *see also Doherty v. City of Chicago*, 75 F.3d 318, 325

(7th Cir. 1996); *Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989). We have recently applied this very standard in an employment "property" case. *See Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997).

The parties do not dispute that Strasburger had a protected property interest in his tenured teaching position. A generous reading of the record might also reveal a genuine issue of material fact as to whether the School Board acted arbitrarily and irrationally. However, Strasburger has not made out the second element by coming forward with an additional constitutional violation or by showing that state remedies are inadequate. Thus, he has not made out a genuine issue of material fact as to all the elements of his claim, and the district court properly granted summary judgment on the property interest count.

Strasburger styles his property interest claim as a violation of "substantive due process." However, under that heading he also makes arguments that are more properly categorized as violations of procedural due process. For example, he complains that he "was given no notice and no hearing at any time before any part of his termination" and "he has been harmed by the absence of such notice and a hearing," and "[h]e has not been afforded 'due process' by the board officials before they took his protected property interest in his tenured employment." Br. for Appellant at 7. We will read his brief as making a procedural due process argument in addition to his substantive ones.[2]

"Procedural due process claims require a two-step analysis. The first step requires us to determine whether the plaintiff has been deprived of a protected interest; the

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[2] We are left with the impression that Strasburger is creating an illusion, combining his best arguments from substantive and procedural due process in an attempt to make a complete whole. In a confused area of the law like due process, courts and counsel alike must strive for the utmost clarity of language and precision of thought.

second requires a determination of what process is due." *Doherty*, 75 F.3d at 322 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Forbes v. Trigg*, 976 F.2d 308, 315 (7th Cir. 1992)). We skip to the second part of the analysis, which is dispositive here. To show a failure of due process, a plaintiff might show that state procedures as written do not supply basic due process or that state officials acted in an "random and unauthorized" fashion in depriving the plaintiff of his protected interest, *Parratt*, 451 U.S. at 540.

Strasburger is not challenging the constitutionality of Illinois' reduction-in-force procedure; that is, he is not arguing that the Illinois procedures do not supply basic due process. He vaguely argues that the School Board's actions were "random and unauthorized," *id.* at 541. While the contours of the *Parratt* jurisprudence are ill-defined, the center of the doctrine is fixed—one who challenges state action as "random and unauthorized" must also demonstrate that state post-deprivation remedies do not satisfy due process. *Id.* For the Fourteenth Amendment does not protect against all deprivations; "[t]he Fourteenth Amendment protects only against deprivations 'without due process of law.'" *Id.* at 537 (quoting *Baker v. McCollan*, 443 U.S. 137, 145 (1979)). State law remedies in theory can satisfy due process as well as federal ones, so we require plaintiffs seeking federal remedies to show the state's remedies lacking.

Strasburger has not alleged or shown that Illinois post-deprivation remedies are lacking. Therefore, Strasburger has not made out a procedural due process violation that necessitates a federal remedy. After all, what he complains of is a conspiracy by state officials to deprive him of a state-created property interest. The State of Illinois should have the first chance to assess the alleged violations of its own laws. The district court properly granted summary judgment to the defendants on the second count.

D. Intentional Infliction of Emotional Distress

Strasburger also claims that the School Board intentionally inflicted emotional distress on him. The district court granted summary judgment to the defendants, reasoning that a claim for intentional infliction of emotional distress could not logically arise from a properly conducted reduction-in-force. Strasburger counters that the overarching conspiracy of the School Board made the reduction-in-force illegitimate. We agree with the district court.

To establish an intentional infliction of emotional distress in Illinois, a plaintiff must prove that: "(1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended that his conduct should inflict severe emotional distress, or knew that there was a high probability that his conduct would cause severe emotional distress; (3) the defendant's conduct in fact caused severe emotional distress." *Doe v. Calumet City*, 641 N.E.2d 498, 506 (Ill. 1994) (citing *Public Fin. Corp. v. Davis*, 360 N.E.2d 765, 767 (Ill. 1976)).

The Illinois Appellate Court recently decided the factually similar case of *Brackett v. Galesburg Clinic Ass'n*, 689 N.E.2d 406 (Ill. App. Ct. 1997). A medical clinic summarily dismissed its employee of forty-four years. The doctors of the clinic made this decision in executive session with no notice to the employee, in violation of their own articles of association. The doctors signed a letter to the employee and ordered her to leave the premises without collecting her personal belongings. The doctors ordered that her termination not be discussed with anyone and issued a summary statement to the newspaper merely noting her termination. One of the doctors hinted to other clinic personnel that the employee was dismissed for something "really bad." *Id.* at 408-09.

The appellate court granted the defendants' motion to dismiss, ruling that the complaint failed to state a cause of action. "[W]e conclude that although plaintiff was certainly subjected to hurt feelings and a certain amount of

indignity, none of defendants' alleged actions constituted conduct that was outrageous or beyond the bounds of decency." *Id.* at 409.

We are confident that an Illinois court would come to the same conclusion regarding Strasburger's claim. He was dismissed after a reduction-in-force. Although he contends that the reduction-in-force was pretextual and that the School Board defamed him, the conduct he complains of was not so "outrageous" as the Illinois tort of intentional infliction of emotional distress contemplates. Likewise, he contends that the School Board members ruined his reputation and standing in the community, but as we discussed above, there is insufficient evidence to show that it was members of the School Board who made the defamatory comments and put a derogatory letter on windshields. We affirm the district court's decision to grant summary judgment to the defendants.

E. Duty of Fair Representation

Strasburger next alleges that the Union failed adequately to represent him in his grievance against the School Board as required by the Labor Management Relations Act ("LMRA"). The district court dismissed this claim because the School Board, as a political subdivision, is not an "employer" under the LMRA. "We review a district court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo*, accepting the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff." *Mallett v. Wisconsin Div. of Vocational Rehabilitation*, 130 F.3d 1245, 1248 (7th Cir. 1997). "[A] complaint [or part of a complaint] should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The LMRA specifically excludes political subdivisions from its definition of "employer." *See* 29 U.S.C. § 142(3) (incorporating definition of "employer" from 29 U.S.C. § 152(2)[3]). The parties do not contest that the School Board is a political subdivision; it therefore cannot be an "employer" under the LMRA. It follows that Strasburger is not an "employee," § 152(3),[4] because he does not work for an "employer."

Section 301 of the LMRA, 29 U.S.C. § 185(a), gives the federal courts jurisdiction to decide claims involving an "employer's" breach of contract with an organization representing "employees": "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." Since the School Board is not an "employer" and Strasburger is not an "employee," § 185(a) provides no federal basis for his claim. *See also Ayres v. International Bhd. of Elec. Workers*, 666 F.2d 441, 444 (9th Cir. 1982) (same result); *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355, 1363 (3d Cir. 1976) (same result). Because Strasburger did not invoke any other basis of federal jurisdiction, the district court properly dismissed his claim.

For the foregoing reasons we AFFIRM the district court's decision granting summary judgment to the School Board and the individual defendants and its decision granting the Union's motion to dismiss.

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[3] "The term 'employer' . . . shall not include . . . any State or political subdivision thereof . . . ." 29 U.S.C. § 152(2).

[4] "The term 'employee' . . . shall not include . . . any individual employed . . . by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3).

FLAUM, *Circuit Judge*, dissenting. The Court disposes of Strasburger's "procedural" due process claim by determining that Strasburger argues that the actions of the School Board in conducting its reduction-in-force were "random and unauthorized"; on this basis, the Majority concludes that Strasburger's failure to establish the inadequacy of Illinois' post-deprivation remedies is fatal to his claim. I believe that this analysis is inconsistent with the Supreme Court's decision in *Zinermon v. Burch*, 494 U.S. 113 (1990), and that Strasburger's case fits within the "narrow" category of cases *Zinermon* carved out from the general rule established by *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny. *See Cushing v. City of Chicago*, 3 F.3d 1156, 1165 (7th Cir. 1993). Accordingly, I dissent.

The "random and unauthorized" label that the Majority attaches to Strasburger's characterization of the School Board's reduction-in-force procedure is a legal conclusion made by the Court, and not one asserted by the appellant in his brief.[1] This conclusion is significant, because when an alleged deprivation is the result of a random and unauthorized act, "the loss is not a result of some established state procedure and the State cannot predict precisely

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[1] I sympathize with the Majority's efforts to make sense out of Strasburger's briefs, in which the arguments are difficult to construe as set forth. While Strasburger seeks to apply *Zinermon* to the facts of his claim, he styles this constitutional claim as a deprivation of his "substantive due process property interest in tenured employment" and then argues that neither *Parratt* nor *Zinermon* are applicable in a substantive due process case. I concur in the Court's disposition of Strasburger's substantive due process claim and will not address it here. However, despite his confusion over what is an admittedly murky area of the law, I believe that it is evident that Strasburger argues that the alleged deprivation was not "random and unauthorized." Of course, whether the deprivation was random and unauthorized is a legal conclusion; Strasburger's characterization of the Board's actions may be rejected if the facts as we review them on summary judgment do not support his argument.

when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Parratt*, 451 U.S. at 541. In such a case, therefore, "no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process." *Zinermon*, 494 U.S. at 129 (citation omitted). Because the Fourteenth Amendment does not proscribe all deprivations of life, liberty, or property, but only those deprivations that are perpetrated by the State without due process of law, we recognize that in cases in which predeprivation process would be impossible, post-deprivation process—in the form of a state-provided remedy or hearing—may be all the process that is due. *See, e.g., id.* at 127-30; *Easter House v. Felder*, 910 F.2d 1387, 1396-97 (7th Cir. 1990) (en banc), *cert. denied,* 498 U.S. 1067 (1991).

I believe that the record in this case supports an inference that the conduct of the School Board was neither random nor unauthorized as we have come to understand those terms. The *Parratt* line of cases establishes that the "controlling inquiry is solely whether the state is in a position to provide for predeprivation process." *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). When a state employee acts in contravention of established state procedures in order to deprive an individual of his property or liberty—even when that deprivation is intentional—predeprivation procedures would be futile "since the state cannot know when such deprivations will occur." *Id.* at 533. Under such circumstances, the "random and unauthorized" actions of the state employee dictate that adequate post-deprivation procedures are all that the Constitution requires. *Id.*

While *Zinermon* reaffirmed these principles, it qualified them by recognizing that in certain circumstances, state officials may abuse their "broadly delegated, uncircumscribed power" in a predictable manner. *See* 494 U.S. at 134-36. When those same officials are the individuals

charged with ensuring that proper procedures are followed, and "when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty [or property], the state officials cannot then escape liability by invoking *Parratt* and *Hudson*." *Id.* at 135. In such a case, predeprivation process would not be futile; the officials charged by the State with ensuring that the proper procedures are followed are also alleged to have deprived the plaintiff of his liberty or property without following those procedures. *See id.* at 137-38. In a *Parratt/Hudson*-type case, the State cannot reasonably be expected to prevent the substantive deprivation from occurring in the first place; by contrast, in a *Zinermon*-type case "it would indeed be strange to allow state officials to escape § 1983 liability for failing to provide constitutionally required procedural protections by assuming that those procedures would be futile because the same state officials would find a way to subvert them." *Id.* at 137-38. In such a situation, *Zinermon* accordingly recognizes that post-deprivation procedures are irrelevant.

We discussed *Zinermon* at length in *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1067 (1991). We acknowledged that "*Zinermon* narrowed the scope of *Parratt*'s application in certain factual circumstances" and recognized that "*Zinermon* hints that a 'narrow' application of the *Parratt* rule may be the appropriate course." *Id.* at 1400. Nonetheless, we concluded that "[i]n its most fundamental form, . . . *Zinermon* holds only that predictable deprivations of liberty or property which flow from authorized conduct are compensable under § 1983." *Id.* at 1402; *see also id.* at 1400 ("[T]he dispositive factor in determining whether *Parratt* will indeed apply in a given situation is still whether the state actor's conduct is 'random and unauthorized' or, as the Court has rephrased it, whether the state actor's conduct is 'predictable and authorized'."). *Easter House* and our subsequent cases have used the "predictable and authorized" test because it is under those circumstances that the State could

have provided meaningful predeprivation procedures. *See id.* at 1399; *see also Cushing*, 3 F.3d at 1165; *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990).

In light of the above, I conclude that the allegedly wrongful deprivation of Strasburger's property interest in his tenured teaching position was both authorized and predictable. As in *Zinermon*, the State has delegated to the appellees "the power and authority to effect the very deprivation complained of here," 494 U.S. at 138, the power to eliminate a tenured teaching position through a reduction-in-force. Further, the State delegated to the appellees "the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful [deprivations]." *Id.* The Illinois School Code sets out the procedures according to which a school board may dismiss a teacher in "contractual continued service". *See* 105 ILL. COMP. STAT. § 5/24-12. The dual role of the appellees in ensuring Strasburger's due process rights is distinguishable from the situation in *Easter House*, in which the defendants "did not have the duty to initiate . . . predeprivation safeguards." 910 F.2d at 1402. Through this dual role, the State authorized the appellees to divest Strasburger of his property interest.

Furthermore, I believe that the deprivation of Strasburger's property interest through an alleged pretextual reduction-in-force was predictable. Illinois courts recognize that the "purpose of the tenure statutes is to assure continuous service on the part of teachers of ability and experience", *Board of Educ. v. Bremen Dist. No. 228*, 461 N.E.2d 406, 409 (Ill. 1984), and as such, they strictly construe the provisions of the School Code governing tenure. *See id.* In addition, Illinois courts have stated that they "cannot countenance, in good faith or bad, any actions of a school board to rearrange teaching positions or assignments in ways which defeat the rights of tenured teachers and circumvent the purpose and spirit of the tenure laws."

Hansen v. Board of Educ., 502 N.E.2d 467, 471 (Ill. App. Ct. 1986). The School Code also allows school boards to dismiss tenured teachers for the reason of "economic necessity." *See* 105 ILL. COMP. STAT. § 5/24-12. Given these constraints, and the available economic necessity justification, it is foreseeable that a school board intent on dismissing a tenured teacher for illegitimate reasons would resort to a pretextual reduction-in-force procedure—the only manner in which a board could dismiss a tenured teacher without cause.[2]

This is not to suggest that all procedural due process claims by tenured teachers challenging reductions-in-force should survive a motion for summary judgment. Rather, I believe that the inquiry in such cases should carefully focus upon whether the plaintiff has established that the school board's reduction-in-force procedure was pretextual or a sham. In my judgment, Strasburger has presented evidence that creates a genuine issue of fact with respect to this question. The Majority itself states that "[a] generous reading of the record might . . . reveal a genuine issue of material fact as to whether the School Board acted arbitrarily and irrationally." Maj. Op. at 9. In addition, Strasburger offered deposition testimony from one School Board member that supports an inference that the appellees acted pretextually in conducting the reduction-in-force.

The substance of this pretext inquiry, however, is not central to my disagreement with the Majority. The Major-

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[2] Indeed, evidence presented in this case, if read in the light most favorable to Strasburger, supports an inference that the appellees' economic necessity justification was in fact pretextual. After the School Board suspended and then reinstated Strasburger earlier in the 1993-94 school year, in March of 1994 Strasburger and one other teacher were the first teachers subjected to a reduction-in-force by the Board in thirteen years. The school district was operating at a financial surplus during this period, and the other tenured teacher was rehired by the Board in the Summer of 1994.

ity, concluding that any misconduct that may have occurred was "random and unauthorized", does not reach this issue, and it instead suggests that Strasburger's claim could have been subject to a motion to dismiss—due to Strasburger's failure to allege that Illinois post-deprivation remedies are inadequate. In this case, because the State was in a unique position to provide Strasburger with meaningful predeprivation procedures, I conclude that the Majority's "random and unauthorized" conclusion conflicts with *Zinermon*. For that reason, I respectfully dissent.

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USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—5-4-98

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 26, 1998

Before

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

CHARLES R. STRASBURGER,
Plaintiff-Appellant,

No. 97-1302

v.

BOARD OF EDUCATION, HARDIN COUNTY COMMUNITY UNIT SCHOOL DISTRICT NO. 1, HARDIN COUNTY EDUCATION ASSOCIATION OF THE ILLINOIS EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION, DAN AUSTIN, DENNIS AUSTIN, DAN BRIDGES, and GERALD MILLER,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 94-CV-4272-JPG

J. Phil Gilbert, *Chief Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.